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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Federal Energy Regulatory Commission,
North Carolina Utilities Commission,
North Carolina Natural Gas Corporation, *et al.*,
Petitioners,

v.

The Public Service Commission of
The State of New York,
Long Island Lighting Company,
The Brooklyn Union Gas Company, *et al.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF N.C. NATURAL, *ET AL.* IN REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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North Carolina Natural Gas Corporation, Public Service Company of North Carolina, Inc., and Piedmont Natural Gas Company, Inc. (N.C. Natural, *et al.*)[1] hereby jointly submit their Brief in Reply to the briefs in opposition filed by the Public Service Commission of the State of New York (New York), The Brooklyn Union Gas Company, *et al.* (Zone 3 Customer Group), and Long Island Lighting Company (LILCO).

[1]In accord with Rule 28.1, N.C. Natural, *et al.* have listed certain subsidiaries and affiliates in their Petition for a Writ of *Certiorari* filed on Monday, May 18, 1981 in No. 80-1939.

1. All of the briefs in opposition urge this Court to condone the D.C. Circuit's judicial amendment of the rate provisions of the Natural Gas Act (Act). In order to do so, this Court would have to ignore the plain meaning of Section 4 of the Act and adopt an interpretation thereof which runs counter to Congress' clear purpose "to protect consumers against exploitation at the hands of the natural gas companies". *E.g., FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972). Further, the Court would have to overrule its own and other Court of Appeals' decisions on point.

Section 4 of the Act, in plain language, gives the Commission the power to determine "the lawfulness of [a] rate" when a regulated company files "increased rates or charges" and to *cure* any unlawfulness in such increased rates, as "the Commission may ... order such ... company to refund, with interest, the portion of such *increased rates or charges* ... found not justified" (FERC Pet. App. I, p. 64a, 15 U.S.C. §717c(e)).[2] Thus, Congress was clearly concerned in the Act with protecting *consumers* from unlawful *increased rates*, regardless of what caused such unlawful increases.[3]

2. It is significant that New York's suggested judicial amendment of the Act is *different* from that undertaken by the D.C. Circuit and supported by Transcontinental Gas Pipe Line Corporation (Transco) in Transco's June

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[2]Emphasis added throughout this brief unless otherwise indicated.

[3]That any question as to what constitutes an "increased rate" must be examined from the *consumers' perspective* is supported not only by the plain words of the Act, but by this Court's decisions consistently holding that the purpose of the Act is to "afford *consumers* a complete, permanent and effective bond of protection from *excessive rates and charges.*" *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 278, 388 (1959).

17, 1981, cross petition in No. 80-2143. New York argues that only where the regulated company is seeking an *overall increase in revenues* from all of its rates, and only to this extent, should the Commission be permitted to retain the Section 4 powers which Congress has prescribed (New York Br., e.g., pp. 8-9). However, whether or not a regulated natural gas company has or has not sought an *overall* increase in its *revenues* by raising all of its rates is an entirely different matter from the concern of Congress expressed in the plain language of Section 4. The Commission's Section 4 curative powers are triggered when there has been an increase in *"a rate or charge"* (FERC Pet. App. I, p. 65a, 15 U.S.C. §717c(e)), not simply when and to the extent that the regulated company seeks *overall revenue* increases.[4]

The fallacy in New York's proposal, aside from the fact that it is contrary to the plain language of the Act, is that it would create absurd and grossly unjust gaps in the Commission's regulatory scheme mandated by Congress. For example, Transco, at the behest of its economically more powerful Zone 3 customers, could file totally unjustified increased rates for Zone 1 and 2 customers while decreasing its rates to Zone 3, and, so long as *overall revenues* were not thereby increased, the Commission and the Zone 1 and 2 customers would

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[4]New York's claim that the zone cost allocation on the Transco system is "neither directly nor indirectly determinative of the rate increase [the pipeline] seeks" (New York Br., p. 8) is not correct. The statement could only be rendered correct (and, even then, only under certain conditions) if one were to substitute the words "increase in revenues" for "rate increase". The levels of the *"increased rates"* (FERC Pet. App. I, p. 64a, 15 U.S.C. §717c(e)) are very much a function of the cost allocation used in developing these rates. Indeed, that is the *reason for the cost allocation litigation in this case* — the Zone 1 and 2 rates were increased too much because of the misallocation of transmission costs.

have *absolutely no Section 4 curative authority as to Transco's increased rates in Zones 1 and 2.*[5] Under New York's theory, any correction in such rates by the Commission would be prospective only, after a lengthy investigatory hearing under Section 5 in which the Commission bore the burden of proof. Until such change ultimately was made, Zone 3 customers would reap an enormous windfall for which absolutely *nothing* could be done.[6] That the Commission's clear authority under the Act should be so circumscribed by judicial amendment is absurd on its face, and would constitute a radical departure from the Commission's past perception of its authority under the Act. *See Kentucky West Virginia Gas Co.*, FPC Opinion No. 416, 31 FPC 141 (1964).

New York's attempt to characterize the issue of cost allocation as a "non-cost" aspect of Transco's tariff is at

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[5]Also, many of the large New York and Philadelphia customers of Transco are served by other pipelines in addition to Transco, and Transco might well conclude that, to meet the competition, it would be desirable to serve its Zone 3 customers at *below* cost, so long as the loss could be made up by above cost rates to the Zone 2 customers (most of whom are wholly dependent upon Transco).

[6]Similarly, Transco could continue, as in the past, to file increased rates which shift ever greater portions of its pipeline system's transmission costs to Zone 1 and Zone 2 customers, and away from the Zone 3 customers, yet the Commission would have no power under Section 4 to order refunds to cure such unjust, unreasonable and unduly discriminatory increased rates.

best a semantic sleight-of-hand (New York Br., p. 8).[7] This contention ignores the fact that under the plain words of the Act the Commission's Section 4 powers are triggered by *"increased rates"* to the consumer (FERC Pet. App. I, p. 64a, 15 U.S.C. §717c(e)); whether or not there are "increased costs" to (or "increased revenues" sought by) the regulated company is not at issue. Further, attempting to argue that Transco's "rate structure" is not a result of the "increased rates" Transco filed is untenable on its face.[8]

4. New York's proposal that this Court condone the D.C. Circuit's judicial amendment of the Act on the basis of New York's "increased revenues"

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[7]It should be noted that New York's argument goes well beyond the more modest contention, rejected by this Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 643-45 (1972), that FERC's power to suspend tariff changes and order refunds does not extend to *non-rate changes* (*i.e.* changes in the terms and conditions of service). Confronted with the contrary holding in *Louisiana Power* —and the situation presented here is clearly an *a fortiori* one—the Court of Appeals opined that that decision and the uniform line of cases following it might have accounted for the Commission's "confusion" over its statutory powers (FERC Pet. App. A, p. 14a). With due respect to the Court below, we would suggest that the Commission exhibits neither reversible error, nor even "confusion", when it follows the holdings of this Court.

[8]New York's brief is replete with references to Transco's "zone rate structure" (New York Br., e.g., p.3), as if such a structure were something *separate* from the rates and somehow dependent upon the 1962 negotiated zone differentials. As discussed in N.C. Natural, *et al.'s* petition (p. 10), FERC Opinion No. 59 did nothing to eliminate *zoned rates* on the Transco system. However, if by "zone rate structure" New York means some sort of *relative* relationship in rate level, the continued use of the same fixed cents-per-Mcf rate differentials has actually made Zone 1 and 2 rates much higher relative to Zone 3 rates. Thus, if there is indeed some "structure" among the relative rate levels, *it has in fact been changed repeatedly by Transco's rate increase filings.*

interpretation seems to have been developed *ad hoc* to fit New York's position in favor of continued undue discrimination in Transco's rates, while attempting to avoid some of the other pitfalls of the Court of Appeals' (and Transco's, in its cross-petition in No. 80-2143) conclusion that only "changed elements" of a rate increase are subject to the Commission's curative powers under Section 4.[9] As New York is apparently well aware, the application of the D.C. Circuit's "changed element" interpretation would lead to a "ratcheting" upward of the natural gas company's rates with the Commission's curative powers under the Act effectively nullified.[10]. For this reason, New York is apparently unwilling to attempt to support the Court of Appeals' decision on cost allocation based upon the Court of Appeals' "changed element" approach.

5. New York and the Zone 3 Customers Group (but not LILCO) have attempted to argue that this Court's decision in *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), is somehow "not inconsistent with" the

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[9]As explained in N.C. Natural, *et al.'s* petition in No.80-1939 (pp. 11-12, 13-14) and their brief opposing Transco's cross-petition in No. 80-2143 (pp. 9-11), the Act speaks of "increased rate[s] or charge[s]," not "increased elements" that may underlie or support such increased rates.

[10]For example, the company would be able to file increased rates reflecting a change in only one element (*e.g.* rate of return) while making no change in the other elements, including those elements which, if changed, would *lower* the rate. New York attempts to gloss over the inconsistency in the D.C. Circuit's opinion between the cost allocation decision and the rate of return decision by claiming that, as to rate of return "Transco initiated a rate increase" (*i.e.*, sought an increase in revenues) (New York Br., p. 18). However, Transco increased its rates in Zones 1 and 2 not only by an increased rate of return but also by an allocation of transmission costs which made the Zone 1 and Zone 2 rates too high (*i.e.* , the Zone 1 and 2 rates bore too large a portion of the system's increased transmission costs).

D.C. Circuit's opinion below, claiming that the pipeline in the *Tennessee* case had, in a separate earlier rate proceeding, filed rates reflecting "a change in zone rate structure" (New York Br., p. 14). New York's and the Zone 3 Group's contention is of course premised on their own theories that, notwithstanding the plain language of the Act, "increased rates" may only be reviewed (and unlawfulness therein cured) under Section 4 to the extent that such rates produce an overall revenue increase or, alternatively, to the extent of "changed elements" therein. However, if these theories were correct and the *only reason* that the pipeline in the *Tennessee* case had been required to "assume [ ] the hazards involved in" initiating a rate increase under Section 4 (371 U.S. 152) was that the pipeline had proposed a change in rate structure in an earlier rate case, surely such a *sine qua non* would have at least been *alluded* to in the Court's opinion. Yet, there is not a hint anywhere in the decision that the result of the case was *dependent upon this* particular posture of the earlier case.[11] N.C. Natural, *et al.* respectfully submit that these arguments stretch the bounds of credulity. It is apparent that this Court's decision in *Tennessee*, unlike the Court of Appeals' decision below, simply honored Congress' plain words in Section 4, as did the Tenth Circuit's decision in *Kansas-Nebraska Natural Gas Co.* v. *FPC*, 534 F.2d 227 (1976), wherein that Court followed this Court's *Tennessee* decision.

6. The Zone 3 Group contends that the D.C. Circuit had a right to ignore and override the Commission-

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[11]Under the New York and Zone 3 Group argument, the result of the case presumably would have been different if, for example, the Commission, rather than the pipeline, had sought the rate design change in the earlier case.

approved settlements as to cost allocation, because the "mere fact" that the 1962 zone rate differentials were part of a settlement wherein it was specifically agreed that such differentials would have *no* force and effect in the future "does not relieve FERC of its responsibility to act under §5(a)" (Zone 3 Customer Group Br., pp. 18-19). But, again, this argument rests on the assumption of the correctness of the "changed elements" theory of the court below. However, even if one were to assume *arguendo* that cost allocation were in fact a non-rate element of Transco's tariff which can only be changed by the Commission prospectively under Section 5, the "non-binding" provision of the settlement, to have any force or effect whatever, must have meant that all parties (including Transco) agreed that *whatever cost allocation method* Transco thereafter reflected in its increased rates would be considered *Transco's* proposed method. The agreement clearly provided that the cost allocation reflected in the settlement would be applicable only for the limited time period of the settlement and would not prejudice the parties' positions by being considered the *status quo* from which a change could only be effected prospectively by the Commission. The Court of Appeals decision inexplicably and unlawfully nullifies this critically important part of the Commission-approved settlement, *Cf. Texas Eastern Transmission Corp.* v. *FPC*, 306 F.2d 345, 357 (5th Cir. 1962), *cert. den.* 375 U.S. 941.

7. The Zone 3 Group attempts to demonstrate that the court decision below overriding the "non-binding" provision of the Commission-approved settlement has not significantly damaged the settlement process at the Commission. The Zone 3 Group cites the number of settlements which have been filed with the Commision since the Commission adopted its order instituting new settlement procedures in FERC Docket No. RM78-16

(Zone 3 Group Br., p. 21). However, these new procedures were specifically designed to *encourage* settlements (of all sorts — including many non-rate matters). Thus, these gross numbers reflect a myriad of factors other than the Court of Appeals' decision below, and therefore prove nothing. Further, the erroneous deduction which the Zone 3 Group wishes the Court to draw from these numbers simply flies in the face of common sense. A more direct and accurate thermometer for measuring the "chilling effect" on settlement is the fact that rate settlements now being filed have *special clauses attempting to disavow the applicability of the D.C. Circuit's opinion* (see our Petition, p. 25).

8. New York urges that the D.C. Circuit was justified in reversing, without remand, the Commission's decision because "the Court held the Commission had failed to proceed under Section 5 ... which permits only prospective changes in the pipeline tariff, and there was no substantial record support" for the Commission's decision (New York Br., p. 17, n. 8). The problem with this contention is that this Court has *directed* that once "an error of law is laid bare" by a court of appeals, such as the D.C. Circuit's finding here that the Commission had erred in failing to proceed under Section 5, "the function of the reviewing court ends", *Idaho Power Co. v. FPC*, 344 U.S. 17, 20 (1952). Thus, this Court has directed, consistent with the intention of Congress, that the *Commission* is to review the evidence under Section 5 and determine in the first instance if Section 5 findings can be made, and if not, whether further evidence is required.

CONCLUSION

For the reasons discussed in our petition and herein, the petitions for a writ of certiorari as to the cost allocation issue should be granted.

Respectfully submitted,

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